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Recent S.D.N.Y. Opinion Further Restricts the Use of Selective Waivers

Last week, Judge Scheindlin of the United States District Court of the Southern District of New York issued an opinion in In re Initial Public Offering Securities Litigation, 21 MC 92 (SAS) (S.D.N.Y. Feb. 14, 2008), that narrowed the applicability of selective waivers of the work product privilege. The decision has significant implications for attorneys representing companies in government investigations.

Documents prepared by attorneys in anticipation of litigation generally are protected from disclosure as attorney work product. The law has been unclear, however, as to whether the production of such documents to a governmental or regulatory agency waives that protection as to other parties or whether the privilege can still remain intact (thereby resulting in only a "selective waiver"). In 1993, the Second Circuit held that a Wells submission produced to the Securities and Exchange Commission ("SEC") was not protected from disclosure as attorney work product in a civil class action suit. See In re Steinhardt Partners, L.P., 9 F.3d 230 (2d Cir. 1993). The Second Circuit concluded that the client waived any protection over the submission by voluntarily producing it to the SEC. Id. The court left open the possibility, however, for a potential finding of selective waiver in other cases, by declining to adopt a *per se* rule and instead stating that analysis of selective waivers must be done on a "case-by-case basis," looking at, among other things, whether the parties shared a common interest and whether they had entered into an explicit confidentiality agreement. Id. at 234.

In applying the case-by-case analysis set forth in the Steinhardt decision, some district courts in the Second Circuit have upheld the assertion of selective waivers. See, e.g., In re Cardinal Health, Inc., Sec. Litig., No. C2 04 Civ. 575, 2007 WL 495150 (S.D.N.Y. Jan. 26, 2007); In re Natural Gas Commodity Litig., No. 03 Civ. 6186, 2005 WL 1457666 (S.D.N.Y. June 21, 2005). Judge Scheindlin's recent decision, however, applies a far more restrictive analysis that, if followed by other courts, would significantly reduce the likelihood that a party's claim of selective waiver would be upheld.

If you have any questions regarding the matters discussed in this memorandum, please call your usual contact at Richards Kibbe & Orbe or one of the persons listed below.

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At issue in In re Initial Public Offering Securities Litigation, were 169 factual summaries that attorneys for Credit Suisse prepared as part of an internal investigation regarding their practices concerning the allocation of shares during initial public offerings. Credit Suisse produced those memoranda and other documents to the United States Attorney's office ("USAO") for the Southern District of New York, as well as to the SEC, pursuant to a letter agreement stating that Credit Suisse and the SEC shared a common interest and containing mutual promises to protect the confidentiality of the information produced by Credit Suisse. The documents were subsequently shared with another regulatory agency and a group of former employees pursuant to a court order. At issue in the district court's opinion was whether the production of those documents to the USAO and the SEC waived the work product protection that otherwise would have prevented their disclosure in the related civil class action litigation.

Rather than simply employ the case-by-case analysis previously advocated by the Second Circuit, the district court created a further restriction by stating that "there is a strong presumption against a finding of selective waiver, and it should not be permitted absent special circumstances." (Slip Op. at 20.) The district court based its conclusion on the grounds that "in the long term, the erosion of the attorney-client and attorney work product privileges through such disclosure will reduce incentives for companies to discover and correct their wrongdoings, thus reducing the value of the information available to the government, and ultimately reducing the bargaining ability of individual defendants, as well as the ability to prepare for litigation." (*Id.*)

After reviewing the parties' arguments, and in light of the "strong presumption against a finding of selective waiver," the district court found that Credit Suisse's voluntary production of the documents to the USAO and SEC waived their otherwise privileged status, and that the documents should be produced to the plaintiffs in the civil class action litigation. (*Id.* at 27.) The court also commented that a finding to the contrary would only serve "Credit Suisse's strategic purposes, not any societal interest in fostering communications between attorneys and their clients." (*Id.*)

The district court's analysis rejected Credit Suisse's common interest letter agreement with the SEC, which had incorporated the common interest and confidentiality language that the Second Circuit appeared to recommend in the Steinhardt decision. The district court explained that there could be no common interest because the USAO and the SEC had acted to investigate the possibility of wrongdoing, whereas Credit Suisse had voluntarily disclosed the documents at issue in an effort to escape or limit liability.¹ The district court added that language in an agreement to the contrary could not be used to "manufacture a common interest *ipse dixit*." (Slip Op. at 24.)

Also of note is that the district court was careful to distinguish between the reporting to the USAO and SEC of the findings of an internal investigation, which may not have constituted a work product waiver, and the voluntary production by

¹ The district court further commented that even when documents are produced to the government in the context of a threatened prosecution and could be characterized as a compelled disclosure, such a disclosure would still be considered voluntary for purposes of a waiver analysis. (Slip Op. at 25.)

Credit Suisse of otherwise protected documents, which the court concluded did constitute a waiver. (Slip Op. at 21.)

In the wake of Judge Scheindlin's decision, it is apparent that courts will be taking a hard view of claims of selective waiver. Indeed, Judge Scheindlin's decision removes any basis for believing that entering into a common interest and/or confidentiality agreement with governmental or regulatory agencies will protect the party producing privileged material to the government from a subsequent claim of waiver. Lawyers representing companies in government investigations should monitor subsequent decisions by courts in the Second Circuit on the issue of selective waiver and developments in proposed legislation relating to selective waiver, including the Attorney-Client Privilege Protection Act of 2007 and proposed Federal Rules of Evidence 502.²

² The Attorney-Client Privilege Protection Act of 2007 (passed by the House on November 13, 2007 and pending in the Senate) would prohibit the government from conditioning treatment of a party in an investigation on the disclosure of communications protected by the attorney-client or work product privileges. As referenced in Judge Scheindlin's opinion (Slip Op. at 16), the Advisory Committee on Evidence Rules recommended a version of proposed Federal Rules of Evidence 502 that protected selective waivers to the government from claims of waiver as to non-governmental persons or entities. However, this selective waiver provision was excluded from the version of FRE 502 that was recently passed in the Senate Judiciary Committee, which essentially codifies the current treatment of inadvertent disclosures by New York courts and contemplates enforcement of the "clawback" and "quick-peek" arrangements permitted under the recent amendment of the Federal Rules of Civil Procedure in Rule 26(b)(5)(B).